"Continuing Evisceration of [the] Fourth Amendment"*

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*. United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976) (Brennan & Marshall, J.J., dissenting).

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INTRODUCTION

During the 1975 term the Supreme Court handed down nine opinions which involved the fourth amendment. In all nine cases the Court reversed state or lower federal court decisions suppressing evidence. This trend undoubtedly led Justice Marshall, dissenting in the ninth case, to state that "[t]oday's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures."[1]

Beyond such broad characterizations, the nine decisions provide important guidance for the resolution of recurring fourth amendment issues. This article will examine these decisions under two rubrics: coverage and protection. Coverage involves the threshold consideration of whether a particular governmental activity falls within the purview of the amendment—that is, whether a search or seizure has occurred with the requisite relationship to persons, houses, papers, and effects. After this determination is made, the focus of the article will shift to the problem of the protection afforded by the fourth amendment. Protection concerns questions such as the warrant requirement, probable cause, and application of the exclusionary rule. These concepts will be treated separately in this article. Additionally specific attention will be paid to the differences between the degrees of fourth amendment protection now available in an arrest situation and the level of protection provided in circumstances involving a search not incident to an arrest.

COVERAGE

The continuing division within the Supreme Court concerning the coverage of the fourth amendment was reflected in *South Dakota*

1. United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976) (Brennan & Marshall, JJ., dissenting).

v. Opperman.[2] In the past the Court defined coverage through the application of either a protected area concept,[3] an expectation of privacy approach,[4] or a balancing test.[5] Some of the lower courts have also applied a motivational test.[6] The question of when the fourth amendment applies is not merely an academic one but rather is one which has continually plagued the courts. The question arises with open field searches,[7] prison searches,[8] the use of elec-

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2. 428 U.S. 364 (1976).

3. Olmstead v. United States, 277 U.S. 438 (1928).

4. *E.g.*, Couch v. United States, 409 U.S. 322 (1973) (taxpayer has no reasonable expectation of privacy as to tax records delivered to an independent accountant because the accountant necessarily had discretion about what information to disclose); United States v. Dionisio, 410 U.S. 1 (1973) (witness legitimately called before a grand jury may not object on fourth amendment grounds to demand for voice recording because such a witness has no reasonable expectation of privacy regarding his voice, a publicly exposed physical characteristic); United States v. Mara, 410 U.S. 19 (1973) (same as to handwriting exemplars). *Cf.* United States v. Biswell, 406 U.S. 311, 316 (1972) (inspections of business premises of federally licensed firearms dealer "pose only limited threats to the dealer's justifiable expectations of privacy"; because firearms business is highly regulated, dealer must have been aware of inspections when he entered the business, and government made him aware of authority for and nature of the inspections).

5. The balancing approach has been applied in a number of cases. In Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967), the "need to search" was balanced against "the invasion which the search entails." *See* Terry v. Ohio, 392 U.S. 1, 17 n.15 (1968). In a more recent case the public interest was balanced against the "individual's right to personal security free from arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975). *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (public interest v. fourth amendment interest of the individual).

6. United States v. Capra, 501 F.2d 267, 280 (2d Cir. 1974); United States v. Blackburn, 389 F.2d 93, 95 (6th Cir.), *cert. denied*, 393 U.S. 882 (1968); United States v. Kahan, 350 F. Supp. 784, 791 (S.D.N.Y. 1972) (dictum), *modified in part*, 479 F.2d 290 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974) (inventories of arrestees); United States v. Lange, 15 C.M.A. 486, 35 C.M.R. 458 (1965) (inspections of government property).

7. *Compare* Hester v. United States, 265 U.S. 57 (1924), *with* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974). An excellent article discussing this area and some of the others mentioned below is Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of, "So What?"*, S. ILL. U. L. J. — (1977).

8. Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment out of Correctional Facilities*, 62 VA. L. REV. 1045 (1976). In determining fourth amendment coverage in the prison context, the courts have used an historical approach, eighth amendment approach,

tronic location beepers,[9] abandonment,[10] plain view,[11] detector

motivational approach, constitutionally protected area concept, reasonable expectation of privacy concept and application of the reasonableness clause. Gianelli and Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1049-64 (1976).

9. The courts are split on whether the use of electronic location beepers constitute a search within the meaning of the fourth amendment. Some courts have indicated that there is no fourth amendment coverage. United States v. Perez, 526 F.2d 859 (5th Cir. 1976) ((dictum)—electronic tracking device in a television set which was used in exchange for heroin); United States v. Hufford, 539 F.2d 32 (9th Cir. 1976) (installation of beeper in caffeine drum that was later transported by a drug suspect); United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976) (installation of beeper in airplane believed used for smuggling drugs into country); United States v. Carpenter, 403 F. Supp. 361 (D. Mass. 1975) (beeper placed into package after valid border search). However, in United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), the court held that placing of an electronic recording device on the defendant's vehicle while it was parked in a public parking lot violated the defendant's fourth amendment rights. *See also* United States v. Martynicik, 395 F. Supp. 42 (D. Ore. 1975) (caffeine barrel).

10. A key question is whether the fourth amendment covers an item left in a trash container. In determining if the fourth amendment applies, the courts have applied various tests. In People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded*, 409 U.S. 33 (1972), *reaffirmed* 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973), the California Supreme Court indicated that an individual has an expectation of privacy in garbage with regard to all people except garbage collectors until the trash is so intermingled that it loses its identity. Other courts have considered where the trash was located. For example, trash located in public receptacles may be seized at will by the police. United States v. Jackson, 448 F.2d 963 (9th Cir. 1971). Additionally, warrantless searches from containers used in common by building tenants have been upheld. United States v. Harruff, 352 F. Supp. 224 (E.D. Mich. 1972). Most of the earlier cases involving warrantless police seizures of items placed in a trash container held that the items were abandoned if the containers were not located in the house or on the porch or within the curtilage.

See also Franklin, *Seizure of Abandoned Property*, 1 SEARCH & SEIZURE L. REP. No. 13, Nov. 1974, at 1; Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFFALO L. REV. 399 (1971).

11. Whether an item is in plain view may depend on the mode and place of observation. United States v. Mitchell, 538 F.2d 1230 (5th Cir. 1976) (use of starlight lens to observe nighttime activities permissible); United States v. Kenaan, 496 F.2d 181 (1st Cir. 1974) (use of ultraviolet lamp constitutes search); United States v. Minton, 488 F.2d 37 (4th Cir. 1973) (use of binoculars to observe cartons being unloaded from vehicle permissible); United States v. Choate, 422 F. Supp. 261 (C.D. Cal. 1976) (use of mail cover is search); United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976) (observing the interior of defendant's apartment by use of 800 millimeter telescope with a 60 millimeter opening is an illegal search); United States v. DeMarsh, 360 F. Supp. 132 (E.D. Wis. 1973) (use of ultraviolet light does not constitute search).

See also United States v. Solis, 536 F.2d 880 (9th Cir. 1976); United States

dogs,[12] and some types of police surveillance.[13]

Opperman involved an automobile inventory in which evidence was found in an unlocked glove compartment. In a 5-4 decision, the closest vote of the term on a fourth amendment issue, the Supreme Court upheld the search. The Court apparently split four to four on the question of coverage; Justice White seemingly did not indicate an opinion. In holding the intrusion reasonable, Chief Justice Burger assumed fourth amendment coverage without directly addressing the issue, for the state had abandoned the "contention that the inventory . . . [was] exempt from the Fourth Amendment standard of reasonableness."[14] However, in speaking for the plurality, the Chief Justice stated: "Given the benign noncriminal context of the intrusion . . . some courts have concluded that an inventory does not constitute a search for Fourth Amendment purposes."[15] In concurrence Justice Powell noted: "Routine inventories of automobiles intrude upon an area in which the private citizen has a reasonable expectation of privacy."[16] Justices Marshall, Brennan, and Stewart concurred in Justice Powell's analysis. Their view, that an automobile inventory constitutes a fourth amendment search, was based upon language in the 1967 decision of *Camara v. Municipal Court.*[17] In *Camara* the Court suggested

v. Bronstein, 521 F.2d 459 (2d Cir. 1975); LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire"*, 8 CRIM. L. BULL. 9, 24-26 (1972); Rintamaki, *Plain View Searching*, 60 MIL. L. REV. 25 (1973); Note, *"Plain View"—Anything But Plain: Coolidge Divides the Lower Courts*, 7 LOY. L.A. L. REV. 489 (1974).

12. Gilligan & Lederer, *Searches by Dogs*, 3 SEARCH & SEIZURE L. REP. No. 1, Jan. 1976, at 1; Schuster, *Constitutional Limitations of the Use of Canines to Detect Evidence of Crime*, 44 FORDHAM L. REV. 973 (1976); Comment, United States v. Solis: *Have the Government's Supersniffers Come Down with a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410 (1976).

13. White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975). The court indicated that police department undercover activity at a college may impose an impermissible chilling effect on the students' and teachers' exercise of free speech rights.

14. 428 U.S. at 370 n.6.

15. *Id.* at 370. However, he concluded that even if the inventory of the automobile was characterized as a search, it was reasonable under the circumstances.

16. *Id.* at 377 n.1 (Powell, J., concurring), *quoting* Katz v. United States, 389 U.S. 347, 360 (1969) (Harlan, J., concurring). After concluding that the inventory of the automobile was a search, Justice Powell indicated that under the circumstances the search was reasonable.

17. 387 U.S. 523 (1967).

that it would be anomalous to find that an individual would be protected from unreasonable searches and seizures only when he is suspected of committing a criminal offense.

In *United States v. Martinez-Fuerte*,[18] the Supreme Court applied a balancing test in determining whether stopping a vehicle at a permanent border checkpoint was a seizure covered by the fourth amendment. In *United States v. Santana*,[19] the Court indicated that a defendant, standing in the doorway of her house, was "not in an area where she had any expectation of privacy."[20] In *United States v. Miller*,[21] the Court held that the fourth amendment does not protect bank records from a subpoena. In speaking for the majority of the Court, Justice Powell used the term "legitimate" expectation of privacy in determining that the bank records were not subject to fourth amendment coverage.

The problems presented by these four cases are best understood within the context of the coverage issues addressed in the past by the Supreme Court. The drafters of the fourth amendment used property-oriented terms—"houses, papers, and effects" and "the place to be searched." Thus, the Supreme Court initially applied property law concepts to define the scope of fourth amendment coverage. For example, in *Olmstead v. United States*,[22] the Court held that wiretapping did not constitute a search within the meaning of the fourth amendment because the interception was effected "without a trespass" and the conversation was not an "effect" and that therefore no protection was offered.[23] However, as the concept of privacy gained increasing support as a legal right, the Court appeared to move away from the trespass theory. In 1961 the Court held in *Silverman v. United States*[24] that the insertion of a spike mike into a party wall was a violation of the fourth amendment even though no technical trespass occurred. Thus although the *Silverman* Court rejected the trespass theory, it refused to reconsider *Olmstead*.

The formal demise of constitutional analysis based upon protected areas came in *Katz v. United States*.[25] In overruling *Olmstead*, the

18. 428 U.S. 543 (1976).
19. 427 U.S. 38 (1976).
20. *Id.* at 42.
21. 425 U.S. 435 (1976).
22. 277 U.S. 438 (1928).
23. *Id.* at 457.
24. 365 U.S. 505 (1961).
25. 389 U.S. 347 (1967). *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 363-64 (1974).

Court substituted a privacy analysis for its protected area approach:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[26]

However, in *Wyman v. James*,[27] the Court applied a motivational rather than a privacy approach. Under the former, law enforcement officers seeking evidence for a criminal prosecution were considered to be conducting a search within the meaning of the fourth amendment. Conversely, if the objective was not prosecutorial, there was no search.[28]

During the 1975-1976 term the Court added a new standard to the test enunciated in *Wyman*. Apart from whether the officers were seeking evidence for criminal prosecution, the Court inquired into whether the police were acting justifiably pursuant to their own procedures as established by their superiors. Giving such deference to decisions made by high ranking officials serves the dual purpose of increasing the effectiveness of law enforcement officials and guaranteeing individual rights by lessening the discretion of the officer in the field.[29]

Thus in *Opperman*, the majority stated: "When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents."[30] The Court also noted that "[s]tandard inventories often include an examination of the glove compartment, since it is a customary place

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26. 389 U.S. at 351-52.
27. 400 U.S. 309 (1971).
28. Uncertainty about the motivational test remains. In a subsequent case, Cady v. Dombrowski, 413 U.S. 433 (1973), the Supreme Court refused to rule on the motivation approach, even though such a ruling was urged by the petitioner. *Id.* at 442.
29. In past terms the Court did not consider this factor. Professor Amsterdam criticized Gustafson v. Florida, 414 U.S. 260 (1973), and United States v. Robinson, 414 U.S. 218 (1973), dealing with the question of a search incident to an arrest. In these two cases the Court refused to distinguish between rules set forth in police department regulations and decisions left entirely to the discretion of the arresting officer. Amsterdam, *supra* note 25, at 415-16.
30. 428 U.S. at 369.

for documents of ownership and registration."[31] The Court stated that "[t]here is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive."[32]

In his concurring opinion in *Opperman*, Justice Powell described the standard inventory and some of the procedures that were followed.[33] He noted that there was "no evidence in the record that in carrying out their established inventory duties the . . . police do other than search for and remove for storage such property without examining its contents."[34] He also noted that discretion in inventory searches was limited because they were conducted "in accordance with established police department rules or policy and occur whenever an automobile is seized."[35]

In *Martinez*, Justice Powell, writing for the majority, held that a warrant was not required to make a stop at a permanent border checkpoint. The Court found that these stops involved little "discretionary enforcement activity,"[36] for the location of the permanent checkpoint was "not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources."[37] Because individuals may be stopped only at a checkpoint, the discretion of law enforcement officials involved in open-road stops is controlled as is the possibility of abuse or harassment.

These recent Supreme Court decisions provide little indication of the relative importance which the Court places on coverage factors, such as protected area, privacy, police motivation, and compliance with procedural rules. Accordingly, those who are faced with fourth amendment problems lack clear guidance in identifying any one test which is preferred to determine whether a given governmental intrusion is subject to fourth amendment coverage. The difficulty in articulating a standard may result from the fact that

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31. *Id.* at 372.
32. *Id.* at 376. "The Court carefully noted that the protective search was carried out in accordance with *standard procedures* in the local police department . . . a factor tending to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function." *Id.* "[F]ollowing standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, the conduct of the police was not 'unreasonable' under the Fourth Amendment." *Id.*
33. *Id.* at 380 nn.6 & 7.
34. *Id.* at 380 n.7.
35. *Id.* at 383.
36. 428 U.S. at 559.
37. *Id.*

no one particular test is appropriate for the wide variety of activity that gives rise to fourth amendment issues. However, the Court should enunciate a set of practical rules.[38] If workable standards are not articulated, police, lawyers, and courts will continue using a trial-and-error method to determine the perimeters of the fourth amendment. Such a haphazard approach neither serves the interests of law enforcement nor protects the fourth amendment rights of individual citizens.

PROTECTION

Once it has been determined that a particular governmental act constitutes a search or seizure, the focus shifts to a secondary inquiry into the protections afforded by the fourth amedment. This inquiry involves a reconciliation of the warrant clause with the reasonableness clause and a determination of the basis required to sustain a search, seizure, or arrest. Until recently the Supreme Court has indicated in a number of cases that warrantless searches are unreasonable per se unless they fall within a few specifically limited exceptions.[39] In *Katz v. United States*,[40] the Court held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[41] The Court cited as examples a series of cases which recognized the automobile exception,[42] the

38. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500 (1971); Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 J. URB. L. 25 (1974); Wilson & Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 LAW & CONTEMP. PROBS. 488 (1971); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

39. United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring); Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); United States v. United States Dist. Court, 407 U.S. 297, 314-21 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 478-82 (1971); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Chimel v. California, 395 U.S. 752, 762 (1969); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Stoner v. California, 376 U.S. 483 (1964); Jones v. United States, 357 U.S. 493, 499 (1958); United States v. Jeffers, 342 U.S. 48, 51 (1951); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Agnello v. United States, 269 U.S. 20, 32 (1925).

40. 389 U.S. 347 (1967).

41. *Id.* at 357 (footnote omitted).

42. Carroll v. United States, 267 U.S. 132, 153 & 156 (1925).

emergency doctrine,[43] the inventory of an automobile impounded under a forfeiture statute,[44] and hot pursuit.[45] Other recognized exceptions noted in *Coolidge v. New Hampshire*[46] are consent, search incident to arrest, and plain view. The Court has also referred to a stop and frisk exception.[47]

The question of whether these exceptions are few and well delineated has been raised before.[48] In upholding the warrantless inventory of an impounded automobile and the warrantless stops of vehicles at permanent checkpoints, the Court again indicated that the exceptions may be neither few nor well established. This development is particularly significant because of the warrantless searches which have been approved by the lower courts but which have not been established by the Supreme Court as exceptions to the warrant requirement. These decisions have involved a movable objects exception,[49] airport searches,[50] and automobile inspection stops.[51]

Requirement for Arrest Warrant

United States v. Watson

In *United States v. Watson*,[52] the Supreme Court upheld a warrantless arrest of the defendant which occurred in broad daylight at a restaurant. On August 17, 1972, six days prior to the arrest,

43. McDonald v. United States, 335 U.S. 451, 454-55 (1948).
44. Cooper v. California, 386 U.S. 58 (1967).
45. Warden v. Hayden, 387 U.S. 294, 298-300 (1967).
46. 403 U.S. 443 (1971).
47. Chimel v. California, 395 U.S. 752 (1969).
48. Amsterdam, *supra* note 25, at 358.
49. United States v. Almas, 507 F.2d 65 (5th Cir. 1975) (suitcase in van); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), *cert. denied*, 411 U.S. 931 (1973); Waugh v. State, 20 Md. App. 682, 318 A.2d 204 (1974) (suitcase consigned to common carrier). *See also* Moylan, *The Warrantless Search of Movable Objects*, 1 SEARCH & SEIZURE L. REP. No. 14, Dec. 1974, at 2; Note, *Mobility Reconsidered: Extending the* Carroll *Doctrine to Movable Items*, 58 IOWA L. REV. 1134 (1973); 5 ST. MARY'S L.J. 187 (1973).
50. United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); Gona, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled*, 18 VILL. L. REV. 1036 (1973); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293 (1972); Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).
51. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); notes 162-67 *infra*.
52. 423 U.S. 411 (1976). *See* Comment, Watson *and* Ramey: *The Balance of Interests in Non-Exigent Felony Arrests*, 13 SAN DIEGO L. REV. 838 (1976).

a postal inspector was informed that the defendant was in possession of stolen credit cards and that the defendant had asked the informant to cooperate in a plan to use the credit cards for financial gain. Later that day the informant delivered one of the cards to the inspector. Although the defendant had agreed to give the informant other cards on August 22, he cancelled the meeting and arranged for the transfer to the informant on August 23. On the date arranged the transfer of the credit card between the informant and the defendant was to be observed by the postal inspector and other officers. The informant had been instructed that if the defendant possessed additional stolen credit cards, he was to give a prearranged signal.

When the informant, who had proved reliable in five to ten previous occasions, gave the signal, the officers arrested the defendant. The defendant was then removed from the restaurant and taken to the street where he was warned as required by *Miranda v. Arizona*.[53] After a body search proved fruitless, Watson was asked if the inspector could look inside his car, which was parked within view. Watson replied, "Go ahead." After the inspector told the defendant that anything found could be used in evidence, he proceeded to open the car door. On the floormat the inspector found an envelope containing two credit cards and a list of names. These two cards furnished the basis for the defendant's conviction.[54]

Citing dicta from earlier cases, the Court held that an arrest warrant was not needed. The Court argued that the warrantless arrest was justified by the common law rule that a peace officer is permitted to make a warrantless arrest for a misdemeanor committed in his presence or for a felony whether or not committed in his presence. Additionally, the majority buttressed its holding by applying an historical approach. The Court noted that in 1792 Congress had invested United States marshals with the authority to make lawful warrantless arrests. Thus, the "balance struck by common law" in authorizing a warrantless arrest had "survived substantially intact."[55] An unarticulated reason for the Court's decision

53. 384 U.S. 436 (1966).
54. The issue of the legality of the arrest was important insofar as it formed the basis of determining that the consent to search was not tainted by an illegal arrest.
55. 423 U.S. at 421.

was that when a warrantless arrest occurs, the basis for the arrest can be determined soon after the arrest.[56]

Justice Marshall, dissenting in *Watson*, indicated that historical reliance was unfounded. He argued that although an officer could make an arrest for a felony not committed in his presence, common law defined *felony* in terms of penal consequences. Unless the punishment involved a total forfeiture of the offender's land, goods, or both, the offense was not a felony. Therefore, only a very narrow class of offenses are common law felonies. The Justice argued that most offenses now are defined as felonies. Thus, he concluded that the application of the rule in terms of its original context would make the Constitution soon outmoded, for "the ancient rule does not provide a simple answer directly transferable to our system."[57]

Justice Powell recognized the anomaly created by the majority opinion. He noted that the governmental intrusion associated with a seizure in the form of an arrest is far more serious than the invasion of privacy associated with a search and seizure of property. Justice Powell reasoned that "[l]ogic . . . would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches."[58] However, he accepted the result reached by the Court because he found "no historical evidence that the Framers . . . were at all concerned about warrantless arrests by local constables and other police officers."[59]

United States v. Santana

In *United States v. Santana*,[60] the Supreme Court faced the issue of whether *Watson* could be extended to allow a warrantless arrest of a person who was standing in the vestibule of her house. Additionally, the Court determined which facts were necessary to establish exigent circumstances in order to permit a warrantless arrest.

Patricia McCafferty agreed to sell an undercover officer some heroin. She told the officer that she would get it from "Mom Santana's." The undercover agent obtained $115.00 from his superiors and recorded the serial numbers. He met McCafferty at a prearranged location and was taken to Santana's residence. McCafferty took the money inside Santana's house. A short time later she transferred the heroin to the undercover agent.

56. *See* Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975).
57. 423 U.S. at 442 (Marshall & Brennan, JJ., dissenting).
58. *Id.* at 429.
59. *Id.*
60. 427 U.S. 38 (1976).

After driving for about two blocks in McCafferty's car, the undercover agent placed McCafferty under arrest. He asked McCafferty where the money was, and she responded "Mom has the money." At that point other officers came up to the car. The undercover agent showed them the envelope of heroin and told them that "Mom Santana has the money." The officers then proceeded to Santana's house, where they saw her standing at the doorway with a brown paper bag in her hand. When they were within fifteen feet of the defendant, they shouted "police" and displayed their identification. Santana retreated into the house and was arrested by the officers in the foyer. As she tried to pull away the brown paper bag in her hand, the officers saw "two bundles of glazed paper packets with a white powder" fall to the floor. The powder proved to be heroin and provided the basis for her conviction.

The district court granted the defendant's motion to suppress on the ground that the recovery of the bait money required a warranted search. The court also held that there were insufficient grounds to justify a warrantless entry. The court reasoned that the doctrine of hot pursuit meant a chase on and about public streets.

The Supreme Court addressed two issues. First, it stated that the defendant was "not in an area where she had any expectation of privacy. . . . She was not merely visible to the public but as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house."[61] Second, the warrantless entry into the defendant's house was justified by a "realistic expectation that any delay would result in destruction of evidence."[62] The defendant's act of "retreating into her house could [not] thwart an otherwise proper arrest."[63] The Court noted that the case involved a true hot pursuit situation governed by *Warden v. Hayden*.[64] However, the Court held that the warrantless search was also justified by the exigencies of the situation which demanded action to preserve evidence.

Justice Marshall indicated that exigent circumstances did exist but that they were created by the officer's action in arresting

61. *Id.* at 42.
62. *Id.* at 43.
63. *Id.* at 42.
64. 387 U.S. 294 (1967).

McCafferty. He argued that this action did not demonstrate that anyone at Santana's home saw the arrest, a condition necessary for finding that exigent circumstances existed. Justice Marshall believed that the circumstances indicated a timed arrest designed to subvert the requirement of a warrant. He argued that if plain view could be used to justify the warrantless arrest and the warrantless entry into the house, the defendant "would have been just as liable to warrantless arrest as she retreated several feet inside her open door as she was when standing in the doorway."[65]

In a concurring opinion, Justice White stated that "a warrant was not required to enter the house to make the arrest, at least where entry by force was not required."[66] He noted that this is the traditional rule in the United States and is in accord with interpretations of the fourth amendment. He criticized Justice Marshall's dissenting opinion by stating that Justice Marshall "would reinterpret the Fourth Amendment to sweep aside this widely held rule and to establish a constitutional standard requiring warrants for arrests except where exigent circumstances clearly exist."[67] This statement seems to confuse the issue in the case. Clearly exigent circumstances existed, unless, as Justice Marshall intimated, the circumstances were of the police officers' own making.

Justice Stevens, joined by Justice Stewart, concurred in a separate opinion. He stated that the warrantless arrest and search should be upheld as a "justifiable police decision" and "even if not justifiable, [it was] harmless [error]."[68]

In *Watson* and *Santana* the Supreme Court expressly declined to follow dicta of its earlier decisions. In *Chimel v. California*[69] and *Coolidge v. New Hampshire*,[70] the Court had emphasized its preference for a warrant, rejecting a broad and elastic view of the fourth amendment. By rejecting this view, the Court was in effect returning to the position it expressed in the 1948 decision of *Tripiano v. United States*.[71] In *Tripiano* the Court stated that "absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances."[72]

65. 427 U.S. at 47 (Marshall & Brennan, J.J., dissenting).
66. *Id.* at 43-44 (White, J., concurring).
67. *Id.* at 44.
68. *Id.* at 44 (Stevens & Stewart, JJ., concurring).
69. 395 U.S. 752 (1969).
70. 403 U.S. 443 (1971).
71. 334 U.S. 699 (1948).
72. *Id.* at 705 (dictum).

By not requiring arrest warrants in circumstances in which they otherwise would be required, the Court seemed to place more emphasis on the protection of property rights than on the protection of individual rights. This anomaly was recognized by Justice Powell. However, the impracticality of applying the exigent circumstances test to the warrant requirement is demonstrated by both *Watson* and *Santana*. In *Watson* the police could not be sure at exactly what point they would cross the probable cause threshold. However, neither did they want to move at the precise moment when they had probable cause because haste could have destroyed the ongoing investigation. In *Santana* immediate action was needed by the police to prevent the destruction of evidence. Thus both cases manifest the impracticality of applying the exigent circumstances test to the warrant requirement. The fact that in these cases the police might have established exigent circumstances by their own actions is certainly important. If the police do utilize their own actions as a pretext for a search of a premises, the Supreme Court should take appropriate action to rule any resultant evidence inadmissible.

Particularity

The fourth amendment mandates that a valid warrant must "particularly describ[e] the place to be searched and the persons or things to be seized."[73] This language has been interpreted to prohibit general warrants. The requirement of particularity involves two pitfalls for the police. First, the description may be too vague. Second, the description of the property to be seized may be overly broad. Both these issues were present in *Andresen v. Maryland*.[74]

Andresen v. Maryland

In *Andresen* an investigation into real estate settlement activities in the Washington, D.C. area centered on the defendant, an attorney engaged in real estate transactions. The investigation establishing probable cause revealed that the defendant had engaged in fraudulent activities concerning lot 13T located in the Potomac

73. U.S. CONST. amend. IV.
74. 427 U.S. 463 (1976). *See The Supreme Court Term, 1975*, 90 HARV. L. REV. 56, 76 (1976).

Woods Subdivision, Montgomery County, Maryland. Additional information indicated that the defendant had misappropriated money regarding other real estate transactions in the Potomac Woods area.

The warrant authorized the seizure of "items pertaining to sale, purchase, settlement and conveyance of Lot 13, Block T, Potomac Woods Subdivision, Montgomery County, Maryland," and listed approximately twenty types of documents that might be seized. In addition to the list of documents, the warrant also authorized seizure of "other fruits, instrumentalities and evidence of the crime at this [time] unknown."

Pursuant to these warrants, the defendant's two offices were simultaneously searched during daylight hours. During the search of his law office, two to three percent of the files in the office were seized. A second search was made of a real estate development corporation office in which the defendant was the sole shareholder, resident agent, and director. This search resulted in the seizure of less than five percent of the corporation files.

On appeal counsel for the defendant argued that because of the large number of documents described in the warrant, it was a general warrant prohibited by the fourth amendment. Counsel also argued that the general inclusion clause for unknown evidence was unconstitutionally vague and violative of the particularity clause of the fourth amendment.

The Supreme Court rejected the overbreadth argument, holding that the mere listing of a series of documents did not make the warrant a general warrant. The Court argued that because the investigation involved a "complex real estate scheme whose existence could be proved only by piecing together many bits of evidence,"[75] a listing was proper. Further, to require a specific justification for each document would allow the fourth amendment to be used as a shield to avoid detection of complex illegal schemes. The Court also upheld the general clause permitting seizure of "other fruits, instrumentalities, and evidence of the crime at this [time] unknown." It held this clause could not be read separately, but rather should be read within the context of the other documents relating to the crime under investigation. The Court further noted that the term *crime* as used in the warrant referred only to the crime of false pretenses regarding the specified lot. The warrant "did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence

75. 427 U.S. at 481 n.10.

relevant to the crime of false pretenses in Lot 13T."[76] The Court recognized that grave dangers are inherent in executing a warrant regarding the seizure of a person's papers. However, it found that the possible examination of unrelated papers did not undermine the validity of the warrant.

The Court cited *Berger v. New York*,[77] in which a state eavesdropping statute authorizing eavesdropping "without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described" was declared unconstitutional.[78] *Berger* illustrated the elements of fourth amendment law which protect the right to privacy by prohibiting general warrants. In order for a valid warrant to issue probable cause has to be shown and the place to be searched and the items to be seized must be described with some particularity. The majority in *Andresen* pointed out that all three of these elements were missing in *Berger*. However, the Court found in *Andresen* that none of the elements were violated. Therefore, the Court concluded that when there was probable cause to search particular places for specific documents, the fact that other documents may have been seen during the search did not violate the tenor of the fourth amendment to the same degree as would a general warrant.

Justice Brennan described the *Andresen* majority opinion as "consistent with the recent trend of decisions to eviscerate Fourth Amendment protections."[79] In order to assess the validity of this criticism, reviewing the evolution of the particularity requirement is necessary.

In *Steele v. United States*,[80] the Supreme Court indicated that a warrant would be considered sufficiently specific in describing the place to be searched if the officer "with a search warrant can with reasonable effort ascertain and identify the place intended."[81] The Court also indicated that the specificity requirement of the items to be seized was satisfied by listing the items as cases of whis-

76. *Id.* at 481-82.
77. 388 U.S. 41 (1967).
78. *Id.* at 58-59.
79. 427 U.S. at 485 n.1 (Brennan, J., dissenting).
80. 267 U.S. 493 (1924).
81. *Id.* at 503.

key. In *Marron v. United States*,[82] the Court declared: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[83]

The meaning of the particularity clause of the fourth amendment was further highlighted in *Stanford v. Texas*.[84] In *Stanford* one of the officers seeking a search warrant stated in his affidavit that he had received information from two credible sources that the defendant had in his possession books and records of the Communist Party, including party lists and financial records. A second affidavit stated that the affiant believed recent mailings were made by the defendant of pro-Communist material. On the basis of the affidavits, the district judge issued a search warrant. The warrant specifically described the premises and permitted the search and the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas."[85]

A five-hour search of the defendant's house resulted in the seizure of two thousand books, pamphlets, and papers.[86] However, the officers did not find any records of the Communist Party or any party listing of dues payments. The defendant filed a motion with the issuing magistrate asking him to annul the warrant and order the return of the property taken from his house. The order was denied and an appeal lodged with the Supreme Court.

Although the defendant alleged a number of constitutional grounds in support of the return of his property, the Court based its decision upon deficiencies in the particularity of the warrant.[87] The Court noted:

> What is significant to note [about history] is that this history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and,

82. 275 U.S. 192 (1927).
83. *Id.* at 196.
84. 379 U.S. 476 (1965).
85. *Id.* at 477-78.
86. Some of the books taken were by such diverse writers as Karl Marx, Jean-Paul Sartre, Theodore Draper, Fidel Castro, Pope John XXIII, and Supreme Court Justice Hugo L. Black. *Id.* at 479-80.
87. Some of the issues the Court did not address are whether the warrant sufficiently specified the offense believed to have been committed and whether the warrant was issued upon probable cause.

> later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth, and eighteenth centuries. In Tudor England, officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan.[88]

The Court added: "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."[89] It noted that the purpose of the particularity clause was to limit what could be seized pursuant to a warrant. However, the Court suggested that the first amendment overtones of the case might provide a basis for a different result in another case. "We need not decide in the present case whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or 'cases of whiskey.' "[90]

Admissibility of Evidence not Listed in Warrant

If a warrant has authorized a search of specific premises, the officer may search that portion of the premises. Within that area he may look anyplace where, on the basis of his professional experience, he believes the items sought might be found. In the past disputes have arisen over whether the police officer may seize items which are not listed in the warrant but which come into plain view. In *Andresen v. Maryland*, the Court held that the officer could seize items that were in their plain view while they were looking for items listed in the warrant. The Court concluded "that the trained special investigators reasonably could have believed that the evidence specifically dealing with another lot in the Potomac Woods subdivision could be used to show petitioner's intent with respect to the Lot 13T transaction."[91]

The Court's approach in *Andresen* differs from that expressed in the early case of *Marron v. United States*.[92] In *Marron*, the of-

88. 379 U.S. at 482.
89. *Id.* at 485.
90. *Id.* at 486.
91. 427 U.S. at 483.
92. 275 U.S. 192 (1927).

ficers executed a search warrant at the defendant's premises. The warrant authorized the officers to seize intoxicating liquors and the articles for their manufacture. Upon entering the premises, the officers observed liquor being illegally served. They proceeded to place the person in charge under arrest. During a search of the entire premises, they seized a large quantity of liquor and ledgers and bills connected with the illegal activity. The Supreme Court held that the seizure of the ledgers and bills was not justified under the search warrant, for their seizure had not been described with particularity in the warrant.[93] The Court's interpretation has been limited in recent years by the development of the plain view doctrine.[94] In light of this development, reliance on *Marron* has been incorrect, an inaccuracy rectified by *Andresen.*

The decision in *Andresen* did not involve a total "evisceration" of the fourth amendment or a marked departure from earlier decisions of the Supreme Court. In *Stanford,* the Court had indicated that the warrant did not meet the particularity requirement when the officers sought documents which were arguably protected under the first amendment. The search in *Stanford* resulted in the seizure of books and documents, none of which related to the records of the Communist Party. The Court implied that a different standard could be utilized when the items to be seized were contraband.[95]

Probable Cause

Staleness of Information

In *Watson* some members of the Supreme Court specifically indicated the difference between probable cause to arrest and probable cause to search. One of the main differences between the two is the relationship of each to the staleness of the information used to establish probable cause. As explained in *Watson,* once probable cause to arrest has been demonstrated, probable cause will exist for weeks, months, or even years unless evidence to the contrary is later uncovered. However, this is not the case for probable cause to search a person or a place. In the search situation the likelihood that the items to be seized will be located in the identified place diminishes with the passage of time.[96] A precise rule delineating

93. *Id.* at 196.

94. United States v. Gray, 484 F.2d 352, 355 (6th Cir. 1973). Not until the Supreme Court decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971), was the plain view doctrine recognized as a separate concept.

95. 379 U.S. at 486.

96. In a concurring opinion in *Watson,* Justice Powell noted: "Probable cause to support issuance of an arrest warrant normally would not grow

when information becomes so stale that probable cause to search may no longer be maintained cannot be established. Staleness depends upon the type of crime, the location, the nature of the articles to be seized, and whether the crime is a continuing operation. The Court in *Andresen* recognized the problem when it held that a three-month delay between the completion of the fraudulent transactions by the defendant upon which the warrants were based and the issuance of the warrant did not negate a determination of probable cause. The Court stated that "it is eminently reasonable to expect that such records would be maintained in those offices for a period of time and surely as long as the three months required for the investigation of 'a complex real estate scheme.' "[97]

Citizen Informant Rule

When an officer appears before a magistrate to obtain a search warrant, he may testify on the basis of information supplied by a third party informant rather than on the basis of his own personal observations in order to establish probable cause. This former type of evidence is hearsay which is normally not admissible at trial. However, such testimony is admissable in a probable cause hearing, subject to the limits established by the Supreme Court in *Aguilar v. Texas*.[98] In *Aguilar* the Court held that the magistrate must be informed of some of the underlying circumstances from which the informant inferred the location of the items sought. Additionally, the individual seeking the warrant must relate some of the underlying circumstances that led him to believe the information credible or the informant reliable.

The second prong of *Aguilar* has been referred to as a reliability test. This test was also applied in *Spinelli v. United States*[99] and

stale as easily as that which supports a warrant to search a particular place for particular objects." 423 U.S. at 432 n.5 (Powell, J., concurring). As the dissenting opinion stated:

> This problem [the time factor] relates, however, to the existence at the time the warrant is applied for of probable cause to believe the object to be seized remains where it was, not whether the earlier probable cause mandated immediate application for a warrant. . . . This problem has no bearing, of course, in connection with a warrant to arrest.

Id. at 449 n.14 (Marshall & Brennan, JJ. dissenting).

97. 427 U.S. at 479 n.9.
98. 378 U.S. 108, 114 (1964).
99. 393 U.S. 410 (1969).

United States v. Harris.[100] In each of these three cases, the test was used to measure the reliability of an informant from a criminal environment. A number of lower courts have indicated the reliability test either should not apply or should be relaxed when the person furnishing the information is not an individual from a criminal environment.[101] Some courts have indicated that if information is from an ordinary citizen, the reliability test is automatically satisfied.[102] Others have indicated that when the information is from an identified bystander or victim eye witness, a presumption of reliability arises.[103] A third view is that rather than applying a presumption of reliability, the courts will be less demanding in determining when the reliability test of *Aguilar* has been met.[104]

Relaxation of the test was recognized in *Andresen.* The Court indicated that the affidavits

> clearly establish the reliability of the information related and the credibility of its sources. The complainants are named, their positions are described, and their transactions with petitioner are related in a comprehensive fashion. In addition, the special-agent affiants aver that they have verified, at least in part, the complainants' charges by examining their correspondence with petitioner, numerous documents reflecting the transactions, and public land records. Copies of many of these records and documents are attached to the affidavits; others are described in detail. . . . Rarely have we seen warrant-supporting affidavits so complete and so thorough.[105]

100. 403 U.S. 573 (1971).

101. *See, e.g.,* United States v. Sellers, 483 F.2d 37 (5th Cir. 1973).

102. United States v. Bell, 457 F.2d 1231, 1238 (5th Cir. 1972). "We have discovered no case that extends [the reliability test] to the identified bystander or victim-eye witness to a crime, and we now hold that no such requirement need be met." United States v. Caniesco, 470 F.2d 1224, 1231 (2d Cir. 1972). "*Aguilar* applies . . . on the informant's tip." United States v. Unger, 469 F.2d 1283, 1286 (7th Cir. 1972). The court indicated that the two-prong test need be applied only when the complaint was based "solely on hearsay information from an unidentified informant." *See also* United States v. Anderson, 533 F.2d 1210, 1213 (D.C. Cir. 1976); United States v. Rollins, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976); Thompson & Starkman, *The Citizen Informant Doctrine,* 64 J. CRIM. L. & CRIM. 163 (1973).

103. *See, e.g.,* United States v. Sellers, 483 F.2d 37 (5th Cir. 1973). Other cases applying a presumption of reliability are People v. Hubbard, 519 P.2d 951 (Colo. 1974); State v. Perry, 499 S.W.2d 473 (Mo. 1973); State v. Chatmon, 515 P.2d 530 (Wash. App. 1973).

104. United States v. Brooks, 350 F. Supp. 1152, 1154-55 (E.D. Wis. 1972); Mobley v. State, 310 A.2d 803, 809 (Md. 1973). "We are in full agreement with the opinion of the Court of Special Appeals that a different rationale exists for establishing the reliability of citizen-informers."

105. 427 U.S. at 478 n.9. The Supreme Court has also indicated that information from non-criminal sources should be accorded greater veracity. *See, e.g.,* Adams v. Williams, 407 U.S. 143, 147 (1972) (description given by a victim of a street crime entitled to greater reliability in a stop and frisk).

The Court was apparently basing its comments on the citizen informant rule. As articulated by the lower courts, the reliability test does not apply with the same degree to a noncriminal citizen. However, as the Court's opinion indicates the verification, thoroughness, and detail of the facts also served to establish reliability.

Exceptions to Warrant Requirement

General

On a number of different occasions the Supreme Court has expressed its preference for a warranted search.[106] Except for a few "jealously and carefully drawn" exemptions, warrantless searches have been viewed as per se unreasonable.[107] The preference for a warranted search was particularly emphasized from 1967-1973. However, currently the Court's preference appears to be weakening.

Two recent cases decided by the Supreme Court seem to indicate that the exceptions to the warrant requirement are not specifically limited. In *United States v. Martinez-Fuerte*,[108] the Supreme Court upheld the warrantless stopping of vehicles at permanent border checkpoints. In an opinion by Justice Powell, the Court held that a warrant was not required to establish a permanent checkpoint. Because one of the main purposes of the warrant is a show of authority, the Court reasoned that this showing was

106. During the early 1950's and before, the Supreme Court took a broad and elastic view of the "reasonableness" clause of the fourth amendment. Until recently, the Court emphasized that "definition of 'reasonableness' turns, at least in part, on the more specific commands of the [fourth amendment] warrant clause." United States v. United States Dist. Court, 407 U.S. 297, 315 (1972).

Under the elastic and broad standard of reasonableness, the trial courts were left with little guidance in determining when a violation of the fourth amendment occurred. The question of reasonableness turned on the peculiar facts of the individual case. In an attempt to limit the scope of a search under the exceptions, the Supreme Court stated that a search incident to a lawful arrest was limited to the immediate area surrounding the arrestee. In further limiting the scope of the search incident to an arrest, the Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971), seemed to apply a doctrine of inadvertence as a predicate to a seizure under the plain view doctrine. The Court may have hoped that this doctrine would encourage warrants by limiting the most frequently used exception to the warrant requirement.

107. Jones v. United States, 357 U.S. 493, 499 (1958).

108. 428 U.S. 543 (1976).

not needed at the checkpoint because of the "visible manifestation of the field officers' authority."[109] Neither was a warrant needed to prevent hindsight from "coloring the evaluation of the reasonableness of a search or seizure."[110] The Court noted that many of the factors related to a stop at a checkpoint were "not susceptible to the distortion of hindsight, and therefore will be opened to post-stop review notwithstanding the absence of a warrant."[111] Additionally, the need for a neutral and detached magistrate was not substantial because "the decision to 'seize' is not entirely in the hands of the officer in the field."[112]

In *South Dakota v. Opperman*,[113] the Court upheld the warrantless seizure of an item from an unlocked glove compartment. The

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109. *Id.* at 565. If no means exist to determine if the person is a police officer, and even if the person is an officer, the question of whether the officer is authorized to make the arrest or search presents certain difficulties. A person has the right to protect himself against assaults and to protect his property. Thus, absent some show of authority, serious injury might be the result from such an encounter.

110. *Id.* When a warrant is obtained on the basis of an affidavit, the grounds establishing probable cause are set forth in the affidavit and can be evaluated later by the trial judge on the basis of the facts that existed at the time of issuing the warrant. At the hearing on the motion to suppress, some courts do not allow the officer to resuscitate the affidavit by testifying about other facts told the issuing magistrate but not included in the affidavit. United States v. Acosta, 501 F.2d 1330 (5th Cir. 1974), *modified in part*, 509 F.2d 539 (5th Cir. 1975); State v. O'Brien, 22 Ariz. App. 425, 528 P.2d 176 (1974), *aff'd on review*, 24 Ariz. App. 192, 537 P.2d 28 (1975); Cockrell v. State, 505 S.W.2d 204 (Ark. 1974); State *ex rel.* Townsend v. District Court, 543 P.2d 193 (Mont. 1975). *But see* United States v. Pike, 523 F.2d 734 (5th Cir. 1975); United States v. Sturgeon, 501 F.2d 1270, 1274 (8th Cir.), *cert. denied*, 419 U.S. 1071 (1974); United States v. Hill, 500 F.2d 315 (5th Cir. 1974). This restriction on testimony serves to prevent recent fabrication which many officers and district attorneys admit does take place. *See* Brief for Amicus Curiae, State of Illinois, California v. Krivda, 409 U.S. 33 (1972), *reaff'd*, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521, *cert. denied*, 412 U.S. 919 (1973).

111. 428 U.S. at 565.

112. *Id.* The participation of the magistrate in the issuance of a warrant has become an accepted premise of constitutional law. The classic explanation of the policy was set forth in United States v. United States District Court, 407 U.S. 297, 317 (1972):

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute [citation omitted]. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgement, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

113. 428 U.S. 364 (1976).

search occurred while the police were inventorying the personal items in an automobile which they had impounded because it was illegally parked. In a concurring opinion, Justice Powell indicated that the warrant requirement did not apply because "[i]nventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized."[114] Thus, there were no special facts for a neutral magistrate to evaluate. He also indicated that one purpose of a warrant was to prevent hindsight from affecting the evaluation of the reasonableness of the search. Because vehicle inventories are conducted in accordance with standard police department procedures, "there is no significant danger of hindsight justification."[115] A third reason offered for requiring a warrant was notice of authority to conduct a search. However, in the automobile inventory situation the owner is generally absent, and the officer involved has little discretion to exercise, for he usually has no choice about the subject of the search or its scope.[116]

The opinions of the Court in both *Martinez-Fuerte* and *Opperman* recognize the standard preference for the warrant except in those "few jealously and carefully drawn" exceptions. Both of these standards have been lessened. The warrant requirement has lost its paramount status. Justice Powell in *Martinez-Fuerte* stated that a warrant would not be required when it would make "little contribution" toward protecting specific fourth amendment issues. His statement indicates that if the benefit of a warrant would be minimal, a warrant will not be required. Additionally, the exceptions to the warrant requirement seem to be expanding. In *Opperman* Justice Powell recognized that the automobile inventory was not one of the exceptions. However, he stated that when the warrant granted only minimal protection of fourth amendment interests and the search was otherwise reasonable, the fourth amendment would not be violated. These decisions seem to indicate a future trend suggesting that a warrant will not be required when it would contribute little to protecting fourth amendment rights. Also the exceptions will probably be expanded to those searches which are deemed reasonable under the fourth amendment. This result is an

114. *Id.* at 383 (Powell, J., concurring).
115. *Id.*
116. *Id.* at 384.

apparent compromise between *Tripiano v. United States*[117] and *United States v. Rabinowitz.*[118] Rather than applying the *Tripiano* test of reasonable practicability of obtaining a warrant, the Court will look to the benefits to be derived from the warrant and to whether those benefits are sufficient to require an officer to obtain a warrant prior to making a search.

Automobile Exception

Perhaps the most significant exception to the warrant requirement is the automobile exception. This exception was first announced in *Carroll v. United States,*[119] in which the Court held that a warrantless search of an automobile stopped on the open highway was permissible if probable cause existed to search the vehicle. The Court stated that "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[120] Since 1925, the Court has decided a number of cases involving automobile searches. The controversy in most cases has been whether a warrantless search may be conducted in a vehicle initially stopped on a public highway and subsequently removed to a public parking lot or police station. The question was again faced by the Supreme Court during the 1975 term.

Texas v. White

In a per curiam opinion in *Texas v. White,*[121] the Supreme Court upheld a warrantless stationhouse search of a bad check suspect's car. The defendant was arrested at 1:30 p.m. while attempting to pass a fraudulent check at the drive-in window of a local bank. Earlier the officers had been informed that an individual fitting the same description and driving the same automobile had tried to negotiate four checks drawn on a nonexistent account. Upon arriving at the bank, the police officers directed the defendant to park his automobile at the curb. While the defendant was parking his automobile, the police observed him trying to stuff something between the seats. The defendant was arrested and taken to the police station. His car was driven to the police station by another officer and searched within an hour of the arrest.

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117. 334 U.S. 699 (1948).
118. 339 U.S. 56 (1950).
119. 267 U.S. 132 (1925).
120. *Id.* at 153.
121. 423 U.S. 67 (1975).

Citing *Chambers v. Maroney*,[122] the Court indicated that if probable cause to search the car existed at the scene, a warrantless search of the car at the stationhouse was constitutionally permissible. Dissenting, Justice Marshall, joined by Justice Brennan, stated that "[o]nly by misstating the holding of [*Chambers*] can the Court make that case appear dispositive of this one."[123] According to the dissent, unlike the *Chambers* vehicle, this car was seized under circumstances giving "no indication that an immediate search would have been either impractical or unsafe for the arresting officers."[124] A review of the case law is needed to determine whether the holding in *White* is inconsistent with prior Supreme Court opinions.

In *Chambers* the arrest took place late at night in a parking lot two miles from the scene of the reported robbery. The defendant and his accomplices were removed from the parking lot near the scene and taken to the police station. A search of the vehicle resulted in the seizure of two pistols found concealed in a compartment under the dashboard. The Supreme Court held that exigent circumstances existed because the car was "readily moveable"[125] and that the opportunity to search was brief. The search was not found to be illegal even though the car was removed to the stationhouse and could have been temporarily detained until a warrant was issued. The Court held that once a basis for searching the car existed, it could not determine which was the greater intrusion, holding the car until a warrant was obtained or searching the car without a warrant. Therefore, the Court upheld the search at the police station.

In *Coolidge v. New Hampshire*,[126] the Court seemed to undermine the *Chambers* holding, stating that exigent circumstances did not exist because the following factors were present. (1) The police knew in advance that the defendant's car was associated with a crime. (2) The defendant had been extremely cooperative throughout the investigation. (3) There was no indication the defendant might flee. (4) The vehicle was regularly parked in the driveway.

122. 399 U.S. 42 (1970).
123. 423 U.S. at 69 (Marshall & Brennan, JJ., dissenting).
124. *Id.* at 70.
125. 399 U.S. at 51.
126. 403 U.S. 443 (1971).

(5) The vehicle was guarded prior to being moved to the police station. (6) No accomplice was known. (7) At the request of the police, the defendant's wife spent the night at a relative's home miles from her own residence. And, (8) no proof existed that anyone else had a motive to interfere with the vehicle.

In order to completely understand the Court's decision in *White*, it is necessary to go beyond *Chambers* and *Coolidge* and examine *Cardwell v. Lewis*.[127] The defendant in *Lewis* was negotiating the sale of his business. The purchaser employed the murder victim, an accountant, to examine Lewis' books. The accountant's body was subsequently found in the front seat of his car, which, in an inept attempt to create the appearance of an accident, had been pushed over a river embankment. However, the car had come to rest in the underbrush at the river's edge. Evidence indicated that the victim had died from shotgun wounds.

After several months' investigation, it was concluded there was probable cause to believe that Lewis was responsible for the murder. The police obtained an arrest warrant and called Lewis to the police station. He complied with their request, arrived at 10:00 a.m. and was questioned by the police. At 3:00 p.m. Lewis requested permission to see his lawyers. Two lawyers arrived at 5:00 p.m., at which time Lewis was placed under arrest. Incident to the arrest, Lewis' car keys and a parking lot claim check were released to the police. The police dispatched a tow truck to bring the defendant's car to the police impound lot where, it was searched some twenty-four hours later.

The Court upheld the seizure of the defendant's car, indicating that its seizure from a parking lot had little legal significance because the same "considerations of exigencies, immobilization on the spot and posting of a guard" applied. In its opinion the Court noted that during the interrogation the defendant's realization that his car constituted incriminating evidence would have increased the incentive and potential for the car's removal. The Court attached little significance to the fact that the evidence obtained from the car, a mold of a tire and paint chippings, could not be easily destroyed. There was only a remote possibility of anyone destroying the evidence or of moving the car prior to a warrant being obtained. However, the Court argued that the automobile was located in a "public place where access was not meaningfully restricted."[128]

127. 417 U.S. 583 (1974). Justice Blackmun wrote the plurality opinion for four Justices with Justice Powell concurring in the result.
128. *Id.* at 593.

In *White* the dissenting opinion by Justice Marshall focused on the meaning of *exigent circumstances* as propounded in *Chambers*. Admittedly, the exigent circumstances present in *Chambers* were different from those found in *White* and *Lewis*. In *White* there was a possibility that if the car remained in the bank parking lot, the evidence might have been destroyed or removed before a warrant could be obtained. The parking lot was accessible to the public, no one was present who could watch the car, and the car was indeed mobile. However, no indication existed of an accomplice or a third party who was working with White. Similarly, in *Lewis* there was no indication of an accomplice, and the defendant was subject to a stationhouse arrest. The Court nevertheless found exigent circumstances even though the evidence could not have been easily destroyed and the police had had probable cause to seize the car for a number of months prior to the defendant's arrest. The possibility of evidence being destroyed was more realistic in *White* than in *Lewis*.[129] As a result of *Lewis* and *White*, the limitations on automobile searches suggested in *Coolidge* may be applicable only to the specific facts of that case. Furthermore, the Court has lessened the exigent circumstances standard.

Hot Pursuit

In *United States v. Santana*,[130] the district court granted the defendant's motion to suppress on the ground that the facts did not establish a hot pursuit—that is, a "chase in and about public streets."[131] Although the Supreme Court agreed that hot pursuit meant some sort of chase, it went on to state that the pursuit "need not be an extended hue and cry 'in and about [the] public streets.' "[132] The Court found that the facts did demonstrate true

129. Some of the lower courts have remarked that *White* indicates that exigent circumstances need not be present to employ the automobile exception. Haefeli v. Chernoff, 526 F.2d 1314 (1st Cir. 1975). *See also* United States v. Cepulonis, 530 F.2d 238 (1st Cir.), *cert. denied*, 426 U.S. 908 (1976). However, in United States v. Robinson, 533 F.2d 578, 583 n.9 (D.C. Cir.), *cert. denied*, 424 U.S. 922 (1976), the court indicated "[w]e assume that if a Supreme Court majority intends to institute such a rule, [elimination of exigent circumstances] and to depart from its prior approach, it will do so by express pronouncement to all concerned." *See also* United States v. Mitchell, 525 F.2d 1275 (5th Cir. 1976).

130. 427 U.S. at 38.

131. *Id.* at 41.

132. *Id.* at 43.

hot pursuit and that the case was governed by *Warden v. Hayden*.[133] The Court stated that *Hayden* did not use the term *hot pursuit* but rather that the search and seizure was based on the "exigencies of the situation."[134]

In *Hayden* an armed robber entered a business premise, took some money, and fled. Two cab drivers, attracted by shouts of "holdup," followed the robber into a house. One cabby radioed the description and location of the robber to the company dispatcher, who in turn relayed the information to the police who were proceeding to the scene. Within minutes the police arrived at the house. They went to the door, identified themselves, and asked for permission to search. Because no objection was forthcoming, the officers proceeded to check the first and second floors. The defendant was found in the upstairs bedroom feigning sleep. When the officers on the first floor and in the cellar reported that no other person was in the house, the accused was arrested. "Prior to or immediately contemporaneously" with the defendant's arrest, the officers found a shotgun and pistol in the flush tank of a toilet, a jacket and trousers fitting the description of the robber's clothing in a washing machine in the cellar, some ammunition in a cap found under the mattress in one of the bedrooms, and ammunition for a shotgun in a bureau drawer in the defendant's room.[135] The defendant objected to the admissibility of these items into evidence.

The Court indicated that it was not necessary for the police to have a warrant prior to the entry, for "the exigencies of the situation made that course" of action imperative.[136]

> The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have ensured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape.[137]

The Court rejected the defendant's argument that the clothes found in the washing machine exceeded the permissible scope of the search, stating that the inference that the officer was "looking for

133. 387 U.S. 294 (1967).

134. 427 U.S. at 43 n.3. The term *hot pursuit* first appeared in Johnson v. United States, 333 U.S. 10, 16 n.7 (1948). It has since been used in Justice Fortas' concurring opinion in Warden v. Hayden, 387 U.S. 294, 310-12 (1967), and in Justice Stewart's majority opinion in Vale v. Louisiana, 399 U.S. 30, 35 (1970).

135. 387 U.S. at 299.

136. *Id.* at 298.

137. *Id.* at 298-99.

weapons [was] fully justified" by the record.[138] In *Hayden* the Court upheld the warrantless entry because when the police entered the house shortly after the suspect and began to search for the suspect and weapons, there was probable cause to search. The Court noted that delay in initiating the search "would [have] gravely endanger[ed] their lives or the lives of others."[139]

One court[140] has interpreted *Hayden* to require the application of the hot pursuit doctrine when the police have probable cause to believe (1) that a felony has been committed and the felon is within the building; (2) that the offense was a violent crime; (3) that the arrest was made in the course of an uninterrupted police investigation; (4) that only a short time had elapsed between the crime and the entry onto the premises; and, (5) that it was reasonable that the felon be identified and arrested at once without seeking a warrant.

In *Santana* the Court implicitly rejected limiting hot pursuit to violent crimes. The Court also rejected any notion that it was necessary to establish that the search was made to protect the lives of the police officers or the lives of others. Additionally, the Court either lessened the quantum of evidence necessary to establish exigent circumstances or it arguably switched the burden of proof. The informant in *Santana* was arrested a block and a half from Mom Santana's house, and the police officer testified that word of the arrest could have reached her within a matter of "seconds or

138. *Id.* at 300.
139. *Id.* at 299.
140. Frager v. United States, 258 A.2d 259, 260 (D.C. Mun. App. 1969). *Hayden* has raised questions about the delay prior to pursuit. *See, e.g.*, United States v. Scott, 520 F.2d 697 (9th Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976) (although lost sight of, suspect's trail established by circumstantial evidence); United States v. Holland, 511 F.2d 38 (6th Cir.), *cert. denied*, 421 U.S. 1001 (1975) (thirty-minute delay); United States v. Shye, 492 F.2d 886 (6th Cir. 1974) (three-hour delay). *Hayden* has also raised questions about pursuit into multiple dwelling units. *See, e.g.*, United States v. Scott, 520 F.2d 697 (9th Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976) (pursued into two-story apartment building containing twenty apartments); People v. Bradford, 28 Cal. App. 3d 695, 104 Cal. Rptr. 852 (1972) (apartment building with eight to twelve units). Other issues concern scope of search (United States v. Miller, 449 F.2d 974 (D.C. Cir. 1971)) and cursory review of premises after apprehension of suspect (United States

minutes."[141] Perhaps this statement was sufficient to meet the government's burden of proof in establishing exigent circumstances. However, the fact that the defendant did not rebut this assertion may have been the controlling factor which led the Court to uphold the arrest and search. The Court also relied heavily upon the fact that the defendant was in a public place when she saw the police.

Automobile Inventory

South Dakota v. Opperman

In *South Dakota v. Opperman*,[142] a police officer placed a parking ticket on the windshield of the defendant's illegally parked, unoccupied car. The citation warned the owner that the vehicle was subject to being towed away. Later the same morning a second ticket for an overtime parking violation was issued. As a result of the two citations, the vehicle was inspected and towed to the city impoundment lot.

At the impoundment lot a police officer observed a watch and other items of personal property in the car. The officer proceeded to unlock the car door and inventory the contents of the vehicle. Contraband was found in the unlocked glove compartment which ultimately led to the defendant's conviction. The Supreme Court upheld the seizure of the contraband even though in order to avoid liability the police were not required to do anything more than remove objects in plain view, close the windows, and lock the doors.

The Court divided 4-4 on the issue of whether the inventory was a search. However, the opinion indicated that even if the inventory was a search, it was reasonable.[143] The Court's determination of the reasonableness of the search was predicated on the assumption that inventories were standard procedure in the police community. It also relied on the fact that there was no suggestion that the in-

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v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972) (when search of house meets with negative result, search must end)).

141. 427 U.S. at 47.

142. 428 U.S. 364 (1976).

143. *Id.* at 370 n. 6. "Given the benign noncriminal context of the intrusion . . . some courts have concluded that an inventory does not constitute a search for Fourth Amendment purposes." In a concurring opinion Justice Powell indicated that "routine inventories of automobiles intrude upon an area in which the private citizen has a 'reasonable expectation of privacy.' Thus despite their benign purpose, when conducted by government officials they constitute 'searches' for the purposes of the Fourth Amendment." *Id.* at 377 n. 1 (Powell, J., concurring). Justice Marshall, dissenting, stated that it would be odd to say that an individual has a right to privacy only when he is suspected of criminal behavior. *Id.* at 385 n.2 (Marshall, J., dissenting), *citing* Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

ventory was a "pretext [for] concealing an investigatory police motive."[144]

In the plurality opinion four distinct reasons for conducting inventories were offered: (1) protection of the owner's property while it remains in police custody, (2) protection of police against claims, (3) protection of the police from potential danger, (4) aid in police attempts "to determine whether a vehicle has been stolen and thereafter abandoned."[145] Although the opinion did not specify the justifications relied upon, the search was found reasonable. At least four justices indicated that the protection of the police against possible claims could not be a basis for the inventory.[146] Justice Powell minimized the importance of this argument by noting that the possibility of a fraudulent claim being submitted always existed whether or not the object was in the car.[147]

The Court addressed only the inventory of the unlocked glove compartment. It did not deal with locked containers.[148] The plurality indicated the "inventory was not unreasonable in scope. . . . [O]nce the policeman was lawfully inside the car to secure the personal property in plain view, it was not unreasonable to open the unlocked glove compartment, to which vandals would have had ready and unobstructed access once inside the car."[149] Justice Powell noted that the trunk was not searched because it was locked. The Court stressed that the case did not deal with an "unrestrained search of an automobile and its contents," but rather with an inventory which was conducted "strictly in accord with the regulations" of the police department.[150] The Court did not reach the question

144. 428 U.S. at 376.

145. 428 U.S. at 369. Judge Charles E. Moylan, Jr., an ex-prosecutor and expert in the fourth amendment area, discounts these reasons for conducting automobile inventories but implies that the reason for the automobile inventory is to "turn up evidence of crime." Moylan, *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. BALT. L. REV. 203, 208-09 (1976).

146. 428 U.S. at 386 n.3 (Marshall, J., dissenting).

147. Justice Marshall stated that to argue that the inventory is needed to protect the police "is belied by the record, since—although the Court declines to discuss it—the South Dakota Supreme Court's interpretation of state law explicitly absolves the police, as 'gratuitous depositors,' from any obligation beyond inventorying objects in plain view and locking the car." *Id.* at 391 (Marshall, J., dissenting).

148. *Id.* at 385 n.1.

149. *Id.* at 376 n.10. *See also id.* at 370 n.6.

150. *Id.* at 379-80 (Powell, J., concurring).

of the discovery of materials which dealt with "intimate areas of an individual's personal affairs" and which could "reveal much about a person's activities, associations, and beliefs."[151]

In his dissenting opinion, Justice Marshall indicated that the inventory was not necessary for reasons of safety because the police had stated that the inventory was undertaken to secure valuables. He argued that although such a rationale could "not be entirely discounted when it is actually relied upon, it surely cannot justify the search of every car upon the basis of undifferentiated possibility of harm."[152] The Justice indicated that if the inventory was not conducted to protect the police, it should not later be justified on that basis.

Justice Marshall responded to the argument that the inventory was necessary to protect the police against fraudulent claims by agreeing with the reasoning of Justice Powell that the inventory would not minimize the frustrations of such claims. He rejected the argument that the inventory was necessary to protect the police against lost property claims on the basis of their negligence. The Supreme Court of South Dakota had explicitly absolved the police as "gratuitous depositors" from any obligation beyond inventorying the objects in plain view and securing the vehicle. He indicated that if the rationale of the inventory was to protect the owner's property, and if there had been no express consent, a search must be conditioned on fulfilling two requirements.

> First, there must be specific cause to believe that a search of the scope to be undertaken is necessary in order to preserve the integrity of particular valuable property threatened by the impoundment. . . . Second, even where a search might be appropriate, such an intrusion may only follow the exhaustion and failure of reasonable efforts under the circumstances to identify and reach the owner of the property in order to facilitate alternative means of security or to obtain his consent to the search, for in this context the right to refuse the search remains with the owner.[153]

Justice Marshall argued that the record showed that locking the vehicle would have been sufficient to secure it, for a car owner would feel secure in leaving a car on a street with only doors locked;

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151. *Id.* at 380 n.7.

152. *Id.* at 390 (Marshall, J., dissenting).

153. *Id.* at 393-94. *See also* Moylan, *The Inventory Search of an Automobile: A Willing Suspension of Disbelief*, 5 U. BALT. L. REV. 203, 219 (1976). "The failure to consult the wishes of the individual concerned makes a mockery of the claim that the search is in the interest of protecting his personal property. It would be of small comfort to go to the penitentiary, reassured that you are there only because the police were adamant in protecting you from petty theft regardless of whether you wished such protection."

the Justice could not understand why anything more should have been done when the car was located in a police impound lot.

The arguments which Justice Marshall advanced regarding the car owner's consent to the inventory were rejected by a majority of the Court. Although Justice White also dissented, he indicated that he did not "subscribe to all" of Justice Marshall's dissenting opinion. Justice White excepted to the discussion concerning the "necessity for obtaining consent of the car owner," while agreeing with "most of [Justice Marshall's] analysis and conclusions."[154] Precedent did not provide the Court with clear guidance for dealing with the factual situation presented in *Opperman*. In *Cooper v. California*,[155] the defendant was arrested for selling heroin. After his arrest the police impounded his car under a statute which authorized the seizure and forfeiture of any vehicle used in the illegal transportation of narcotics. In upholding the warrantless search of the vehicle, the Court stated that "the reason for and nature of the custody may constitutionally justify the search."[156] Because the vehicle was to be held until the forfeiture proceedings were completed, the Court concluded that holding that the police had no right to search the car for their own protection would have been unreasonable.[157]

In *Harris v. United States*,[158] the police impounded the defendant's car after making a cursory search at the scene of a robbery arrest. Pursuant to police department regulations, the officer in charge was obligated to inventory and remove all valuables from the vehicle and to secure the vehicle in the impound lot. The officer opened the door on the driver's side, searched the car, and placed a property tag on the steering wheel. While closing the passenger door window, he saw a registration card lying face up on the metal door stripping. The Court held that the registration card was admissible in evidence, for it was in plain view at the time the officer was securing the vehicle. Justice Douglas concurred in the Court's opinion. However, he stated that the search was reasonable "because . . . (1) the car was lawfully in police custody, and the police

154. 428 U.S. at 396 (White, J., dissenting).
155. 386 U.S. 58 (1967).
156. *Id.* at 61.
157. *Id.* at 61-62.
158. 390 U.S. 234 (1968).

were responsible for protecting the car; (2) while engaged in the performance of their duty to protect the car, and not engaged in an inventory or other search of the car, they came across incriminating evidence."[159]

In *Cady v. Dombrowski*,[160] the Court upheld a protective search of a car which occurred five hours after the defendant's arrest. The local police "were under the impression" that the defendant, a Chicago police officer, was required to carry his service revolver. Thus, the police believed that a weapon might be in the car and available to vandals. The Court upheld the reasonableness of this protective search on the grounds that it was conducted pursuant to standard procedures in the local police department and was conducted to protect the public.

Opperman is an important case because it enunciates grounds for conducting an inventory and because it indicates the inquiry which the Court will conduct in order to determine if any of the grounds are present. If a valid reason for conducting the inventory does exist, the inventory will be found reasonable provided it is not a subterfuge for a search of the vehicle. The *Opperman* Court also rejected the consent theory espoused by Justice Marshall. However, the Court did not deal with the question of inventorying locked or closed containers found in the vehicle. Questions concerning the scope of a proper inventory have caused a split among the federal and state courts.[161] However, the reasoning applied by the majority and Justice Powell would permit inventories of property found in locked or closed containers for security purposes if the vehicle was to be impounded for a significant period of time.

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159. *Id.* at 237.

160. 413 U.S. 433 (1973).

161. Some courts have opined that every item in the car may be inventoried regardless of where it is located. *See, e.g.*, State v. Wallen, 185 Neb. 44, 173 N.W.2d 372 (1970). Others have stated that the inventory of hidden areas may be justified under unusual circumstances. *See, e.g.*, United States v. Watkins, 22 U.S.C.M.A. 270, 46 C.M.R. 270 (1973); State v. Patterson, 8 Wash. App. 177, 504 P.2d 1197 (1973). Some courts have indicated that the police are not allowed to inventory items in locked or closed containers. Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P.2d 84, 94 Cal. Rptr. 412 (1971). *See also* United States v. Gravitt, 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); State v. Gwinn, 301 A.2d 291 (Del. 1972); State v. McDougal, 68 Wis. 2d 399, 228 N.W.2d 671 (1975).

In United States v. Mitchell, 458 F.2d 960, 966 (9th Cir. 1972) (dissenting opinion), an "effective compromise" was enunciated: "to permit extensive inventory searches of seized vehicles, so as fully to protect the police, but to forbid, over the objection of one having standing, the use of any item seized in the search as evidence against the objector."

Inspection Stops of Automobiles

A number of courts have indicated that a police officer may make selective, non-arbitrary, non-discriminatory, uniform inspection stops of automobiles.[162] The purpose of these stops is to check the operator's license, vehicle registration, and inspection stickers. Such inspections have been permitted under a number of state statutes.[163] However, at least two courts have indicated that such selective inspections may be conducted at roadblocks or checkpoints but may not be conducted randomly of single cars absent probable cause to believe that an offense has been committed.[164]

The Supreme Court last term indicated in dicta that these selective inspection stops are permissible. In *South Dakota v. Opperman,* the Court noted: "As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order."[165]

In *United States v. Martinez-Fuerte,* the Court stated:

> Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters . . . . As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incidental to highway use.[166]

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162. United States v. Cupps, 503 F.2d 277 (6th Cir. 1974) (dictum); United States v. Lepinski, 460 F.2d 234 (10th Cir. 1972); United States v. Turner, 442 F.2d 1146 (8th Cir. 1971); State v. Swift, 232 Ga. 535, 207 S.E.2d 459 (1974); People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975). *Cf.* State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441 (1975) (court overturned trial court decision, stating that a policeman's reasonable suspicion of criminal activity was necessary to justify his stopping an automobile); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973) (officer's stopping a single vehicle without any indication of a violation of the Motor Vehicle Code was constitutionally impermissible).

163. IDAHO CODE § 49-319; KY. REV. STAT. § 186.510; N.J. REV. STAT. § 39: 3-29.

164. State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441 (1975); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).

165. 428 U.S. 364, 368 (1976).

166. 428 U.S. 543, 560-61 n.14 (1976).

Extended Border Search

A number of recent decisions by the Supreme Court have concerned the right of immigration and naturalization officials to make warrantless arrests, searches, and stops. In *United States v. Martinez-Fuerte*, the Court broke down for analysis the three types of "inland traffic-checking operations." These are: (1) the permanent checkpoints which are maintained at or near the intersection of important roads leading away from the border,[167] (2) temporary checkpoints which operate similarly to permanent checkpoints and are occasionally established in strategic locations, and (3) a roving patrol maintained to supplement the checkpoint system.[168]

The two permanent checkpoints mentioned in *Martinez-Fuerte* were established near San Clemente, California, approximately sixty miles from the Mexican border. A large black and yellow sign one mile from the checkpoint notified all vehicles of the approaching checkpoint station. At the checkpoint two large signs with flashing red lights suspended over the highway stated "Stop here—United States Officers." The traffic was funneled into two lanes while a border patrol agent checked the vehicles as they drove past.

The officer generally screened all north-bound traffic. However, most motorists were allowed to resume their progress without any oral inquiry or close visual observation. In a few cases the

167. *Id.* at 552. The Supreme Court in Carroll v. United States, 267 U.S. 132, 154 (1925) stated: "Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." As to the basis for the searches and the types of searches, see Bernsen, *Search and Seizure on the Highway for Immigration Violations: A Survey of the Law*, 13 SAN DIEGO L. REV. 69 (1976); Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment, id.* at 82; Milchen, *Criminal Law at the International Border*, 6 SAN DIEGO L. REV. 1, 8 (1969); Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968); Recent Development, *Alien Checkpoints and the Troublesome Tetralogy:* United States v. Martinez-Fuerte, 14 SAN DIEGO L. REV. 257 (1976).

168. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Searches of automobiles by roving patrols violate the fourth amendment absent probable cause or consent. The fourth amendment permits a roving patrol to stop a vehicle in this situation only when reasonably founded suspicion exists and is based upon specific articulable facts that the occupants are aliens illegally in the country. The Court stated in United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975), that only when there is such suspicion may an officer "question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."

point agent concluded that further inquiry was needed and directed the vehicle in question to a secondary inspection area. At the inspection area the occupants were asked about their citizenship and immigration status.

The Court rejected a warrant requirement for this type of stop. The majority noted that the public interest in requiring a stop at a checkpoint was great whereas the fourth amendment intrusion was "quite limited."[169] The stop could involve a brief detention of the traveler, perhaps a few brief questions, and possibly the production of an immigration document. However, the Court viewed the border checkpoint stop as considerably less intrusive than a search of the vehicle. The Court stated that the stop would generally not frighten a lawful traveler in the same manner as would an intrusion into an individual's house or an arrest on the street. Additionally, the Court noted that the interference with normal traffic was "minimal." The Court also indicated that the possibility for discretionary law enforcement was limited because the "location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources."[170] Thus, there was little room for abusive or harassing stops. Neither was there a possibility of stigmatizing those diverted because generally all motorists were afforded equal treatment.

The Court found that the use of the secondary inspection area at the San Clemente checkpoint did not violate the fourth amendment. The majority indicated this finding would be true even "if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry."[171] Using a statistical basis, the Court indicated that during the eight days surrounding the arrest roughly 23,000 individuals of Spanish or Mexican ancestry were expected to pass through the checkpoint. Yet only 820 people were referred to the secondary area. The Court indicated that this refuted "any suggestion that the Border Patrol relies extensively on apparent Mexican ancestry standing alone in referring motorists to the secondary area."[172] The Court also argued that the officials' reliance

169. 428 U.S. at 557.
170. *Id.* at 559.
171. *Id.* at 563.
172. *Id.* at 563 n.16.

upon apparent Mexican ancestry did not violate an individual's rights because certain characteristics were clearly relevant to the law enforcement function of the border stop.

In dissent Justice Brennan attacked the "subjective aspects of checkpoint stops."[173] He argued that the statistics cited by the majority did not indicate whether those of Mexican ancestry were being harassed. However, the Justice did think that it was quite likely that those referred were "over-whelmingly" Mexican[174] and that those of Mexican descent would feel resentful and harassed when compared to the public in general. Justice Brennan rejected the Court's position that the public interest outweighed the individual's interest in the requirement of reasonable suspicion and a warrant.

> Dispensing with reasonable suspicion as a prerequisite to stopping and inspecting motorists because the inconvenience of such a requirement would make it impossible to identify a given car as a possible carrier of aliens is no more justifiable than dispensing with probable cause as prerequisite to the search of an individual because the inconvenience of such a requirement would make it impossible to identify a given person in a high-crime area as a possible carrier of concealed weapons.[175]

Consent

The consent theory is one of the most frequently relied upon justifications for a search or a seizure. The consent theory is often relied upon because it involves little consumption of time plus the factor that it offers an opportunity to search when probable cause, either for a search or an arrest, is lacking. In *Schneckloth v. Bustamonte*,[176] the Supreme Court held that it was unnecessary for the prosecution to establish knowledge of the right to refuse to consent as a predicate for a valid waiver of fourth amendment rights. However, the Court expressly did not decide whether knowledge had to be shown when the individual alleged to have waived his rights was in custody at the time of the alleged consent.[177]

In *United States v. Watson*, the Court held that the defendant voluntarily consented to a search of his vehicle after he had been arrested. The Court rejected an argument that since the defendant was in custody, it was necessary to show that he knew of his right to refuse to consent. The Court stated that consent depended upon the totality of circumstances. In *Watson* the circumstances were

173. *Id.* at 571 (Brennan, J., dissenting).
174. *Id.*
175. *Id.* at 575.
176. 412 U.S. 218 (1973).
177. *Id.* at 241 n.29.

"no overt act or threat of force, . . . no promises . . . no indication of more subtle forms of coercion."[178] The consent was given while on a public street and not in the custody of the police and the police station. The Court indicated that the subtle pressures that take place during a station house interrogation do not take place on the street. Additionally, the defendant was not "a newcomer to the law, mentally deficient or unable in the face of a custodial arrest to exercise a free choice. He was given Miranda warnings and was further cautioned that the results of the search of his car could be used against him."[179]

The Court's standard can be criticized for a variety of reasons. By failing to require a knowledgeable waiver, the Court has favored those who know they do not have to consent, such as a professional criminal or educated person. The argument advanced by the majority that a subjective test would hamper law enforcement is questionable. Either consent is generally obtained before there is probable cause to search or consent is an alternative to a warrantless search. The Court's decision will also not prompt law enforcement officials to obtain warrants. Additionally, the decisions may have the effect of implicitly overruling prior decisions. Finally, the psychological pressures mentioned in *Miranda v. Arizona*[180] may come to bear upon the voluntariness of the waiver of fourth amendment rights as they do upon a waiver of fifth amendment rights against self-incrimination. However, the consequences of waiving the rights can vary greatly. The waiver of a fourth amendment right does not affect the reliability of the truth-determining process. But waiver of the right to counsel or right against self-incrimination might affect a right to a fair trial or the truth-determining process.

Summary

The fourth amendment has two clauses: the warrant clause[181] and the reasonableness clause.[182] Are these two clauses coequal

178. United States v. Watson, 423 U.S. 411, 424 (1976).
179. *Id.* at 425.
180. 384 U.S. 436 (1966).
181. U.S. CONST. amend. IV. "[N]o Warrant shall issue, but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized."
182. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated." *Id.*

or should one be considered paramount? A number of commentators and justices have expressed the view that the warrant clause is the paramount clause. Justice Frankfurter was one of the staunchest advocates of this position. His dissenting view in *Harris v. United States*[183] and *United States v. Rabinowitz*[184] became the majority view in *Chimel v. California*,[185] which expressly overruled *Harris* and *Rabinowitz*. In *Harris* he stated "with minor and severely confined exceptions . . . every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant."[186] This same view was later expressed in *Katz v. United States*.[187] Justice Jackson advocated a position which would have gone even further. He would have held that a search was prima facie unlawful unless undertaken pursuant to a valid warrant.[188] Other commentators have also argued in favor of the paramountcy of the warrant clause.[189]

The fourth amendment itself does not provide an answer. Professor LaFave states this failure is "[a]pparently because of an oversight in the redrafting process."[190] However, Professor Taylor has argued that to make the warrant clause the paramount clause is to "st[an]d the fourth amendment on its head."[191]

The resolution to this dispute is dependent upon whether one employs an historical or a contemporary interpretation of the fourth amendment.[192] The issue has been variously phrased:

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183. 331 U.S. 145, 155 (1947) (dissenting opinion).
184. 339 U.S. 56, 68 (1950) (dissenting opinion).
185. 395 U.S. 752 (1969) (dissenting opinion).
186. 331 U.S. at 162.
187. 389 U.S. 347 (1967). "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Id.* at 357 (footnote omitted).
188. 331 U.S. at 195-98 (Jackson, J., dissenting).
189. *E.g.*, ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 28 (Preliminary Draft No. 1 (1967):

> The Fourth Amendment . . . is somewhat strangely constructed. It consists of two conjunctive clauses. . . . But the Amendment nowhere connects the two clauses; it nowhere says in terms what one might expect it to say: that all searches without a warrant issued in compliance with the conditions specified in the second clause are *eo ipso* unreasonable under the first.

See also La Fave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9 (1972).
190. La Fave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULLETIN 9, 10 n.4 (1972).
191. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-24 (1969).
192. *Id.*

> Does the Constitution speak as of yesterday, today, or tomorrow? By what temporal standards are its words to be measured? Does the Constitution mean what it was meant to mean, or what it has come to mean, or what it ought to mean? Are these alternatives mutually exclusive, or may they be used in combination or according to circumstance?[193]

An historical approach looks at the meaning of the fourth amendment at the time it was adopted. Under this view searches which parallel the forcible rummagings of the English messengers and the colonial customs officials would be impermissible. Similarly, those arrests and searches that were considered permissible at the time of the adoption of the amendment would be permissible today. This approach should be rejected if we have a Constitution that was "intended to endure for ages to come."[194] Justice Cardozo stated that a Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future"[195] and "a principle to be vital must be capable of wider application than the mischief which gave it birth."[196] Searches and seizures which parallel the evils that the amendment sought to prevent should be illegal. The rights which the amendment was designed to protect should remain protected.

Although a contemporary approach does not look at the amendment yesterday, it does not totally reject history. As Justice Frankfurter observed, "the meaning of the Fourth Amendment must be distilled from contemporaneous history."[197] This approach looks at the values, interests, and judgments of the Founding Fathers and applies them to contemporary society to determine the meaning of the fourth amendment. The Supreme Court's decisions encompassing electronic surveillance,[198] stop and frisk procedures,[199] and ad-

193. *Id.* at 5-6.

194. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). *See also* Amsterdam, *supra* note 25, at 361-64 & 396. "It is equally indisputable that the amendment goes farther [than the forcible rummages], both because the Supreme Court has so construed it for a century and because to construe it otherwise would render it a constitutional step child." *Id.* at 363 (footnotes omitted).

195. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921).

196. Weems v. United States, 217 U.S. 349, 373 (1910).

197. Davis v. United States, 328 U.S. 582, 605 (1946) (dissenting opinion). *See also* Chapman v. United States, 365 U.S. 610, 619 (1961) (Frankfurter, J., concurring).

198. Katz v. United States, 389 U.S. 347 (1967).

199. Terry v. Ohio, 392 U.S. 1 (1968).

ministrative inspections[200] under the umbrella of fourth amendment coverage demonstrate the utilization of the contemporary approach.

The approach which the Burger Court decides to use will have an impact on the future decisions of the Court.[201] In *United States v. Watson*,[202] the Court upheld the warrantless arrest of the defendant in a public place during daylight hours even though probable cause for the arrest had existed for a number of days. In reaching its decision, the Court examined the meaning of the fourth amendment at the time it was adopted. The Court found that at common law the warrantless arrest was permitted[203] and that this rule also prevailed in the United States at the time the fourth amendment was ratified. Additionally, the Second Congress had passed a statute that permitted United States marshals to make warrantless arrests.[204] The Court noted that "the balance struck by the common law in generally authorizing felony arrests on probable cause, but without warrant, has survived substantially intact."[205] Since 1791, states, Congress, and some commentators have approved warrantless arrests so long as they were based on probable cause. The Court's approach does not reflect strict adherence to an historical approach, but rather the application of the values and judgments of the Founding Fathers to contemporary society.

Recognizing the paramountcy of the warrant clause, Justice Powell opined: "Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches."[206] He argued that an arrest was a seizure of the person resulting in the significant deprivation of freedom especially when contrasted with a stop on less than probable cause. Since the Court had rejected property law concepts which provided that the fourth amendment protects the right to privacy rather than property rights and since personal liberty is more important than property rights, he believed that an arrest warrant should be obtained absent

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200. Camara v. Municipal Court, 387 U.S. 523 (1967).

201. Whether the Court takes an historical approach or a contemporary approach would make a fundamental difference in whether the use of marihuana dogs and location beepers constitutes searches within the meaning of the fourth amendment. The extent of the coverage of the fourth amendment in prison will also vary depending upon the approach taken by the Court.

202. 423 U.S. 411 (1976).

203. 4 W. BLACKSTONE'S COMMENTARIES 292-93 (Lewis ed. 1902); 10 HALSBURY'S, LAWS OF ENGLAND 344-45 (3d ed. 1955).

204. 423 U.S. at 420. *See* Wilgos, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 547-50, & 686-88 (1924).

205. 423 U.S. at 421.

206. *Id.* at 429 (Powell, J., concurring).

exigent circumstances. However, Justice Powell noted that "logic sometimes must defer to history and experience. . . . There is no historical evidence that the Framers . . . were at all concerned about warrantless arrests by local constables and other police officers."[207] Although Justice Powell relied on the same historical basis as the majority he stated: "Of course, no practice that is inconsistent with constitutional protections can be saved merely by appeal to previous uncritical acceptance."[208]

Justice Powell's reasoning has two weaknesses. First, he used a negative inference, unconcern with arrest, to support the inference that an arrest warrant need not be obtained even though there was time to obtain a warrant. His argument runs in the following manner: Common law permitted warrantless arrests, the states and Congress have permitted warrantless arrest; therefore, permitting warrantless arrests was "not an unnoticed acceptance of history." Justice Marshall attacked the premise of the argument when he stated that the common law permitted warrantless arrest only for a narrow class of offenses and that past history was not readily transferable to our society.[209] The Justice warned that "[u]nless the [historical] approach of this opinion is to be fundamentally rejected, it will be difficult, if not impossible, to follow these sources to any but one conclusion—that entry to effect a warrantless arrest is permissible."[210]

The warrant clause no longer has the prominence it had during the Warren Court era. The Burger Court has demonstrated that the exceptions to the warrant clause are neither few nor well delineated. During the last term the Court added a new exception, stops at permanent checkpoints, and resorted to the amorphous exigent circumstances test instead of the well-delineated hot pursuit doctrine.

What was thought to be an "absolute rule"—that warrantless searches are per se unreasonable absent exigent circumstances or one of the previously recognized exceptions—may also be subject to evisceration. The majority in *Watson*, *Santana*, and *Martinez-Fuerte* and the plurality in *Opperman* did not refer to the absolute

207. *Id.*
208. *Id.* at 430 (concurring opinion).
209. *Id.* at 442 (dissenting opinion).
210. *Id.* at 454.

rule. Interestingly, the rule had been set forth in all other recent pertinent cases with the exception of *Cardwell v. Lewis.* The failure of the Court to refer to the rule was not an oversight. The rule was mentioned in the concurring opinion in *Opperman*[211] and by the dissenters in *Watson,*[212] *Lewis,*[213] *Santana,*[214] and *Martinez-Fuerte.*[215] It may be that the majority of the Court has decided to adopt a compromise position—that is, the general rule will not be expressly overruled but exigent circumstances will become easy for the prosecution to establish. The Court may not want to articulate that both clauses are coequal because of the impact of eliminating the warrant clause. By retaining the general rule, the Court will be able to strike down searches when it believes that a warrant definitely should have been obtained. If the Court held the clauses coequal, the police would be able to avoid the cumbersome warrant procedures.

In those cases in which the warrant clause might apply, the Supreme Court has indicated that it will examine the purpose of the warrant and determine whether a warrant would contribute to protecting specific fourth amendment interests.[216] The Court has perceived the warrant as a means of preventing discretionary decisions by law enforcement officials. It can also prevent post hoc rationalizations of a warrant, for the Court has required that affidavits supporting the warrant must be executed prior to its issuance.[217] Further, the warrant is a visible manifestation of authority. Thus, in *Martinez-Fuerte* the Court noted that whenever the warrant did not contribute to protecting the right to privacy, it would not be required.

Both *White* and *Santana* raised the issues of which facts constitute exigent circumstances and which party has the burden of proof and the burden of going forward when the prosecution has attempted to justify a search or seizure on the basis of the exigent

211. 428 U.S. at 381 (Powell, J., concurring).
212. 423 U.S. at 444 (Marshall, J., dissenting).
213. 417 U.S. at 596 (Stewart, J., dissenting). "The most fundamental rule in this area of constitutional law is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" Katz v. United States, 389 U.S. 347, 357 (1967).
214. 427 U.S. at 45 (Marshall, J., dissenting). "Earlier this Term, I expressed the view that, in the absence of exigent circumstances, the police may not arrest a suspect without a warrant."
215. 428 U.S. at 543 (Brennan, J., dissenting).
216. *See id.* at 566.
217. *See id.* (dictum).

circumstances—that is, in either the automobile exception or hot pursuit.[218] In *Vale v. Louisiana*, the Court stated: "The burden rests on the State to show the existence of such an exceptional situation."[219] Thus, the burden of proof has not been changed by the two recent cases. However, the burden of going forward with evidence has been transferred to the defendant.[220]

In its discussions of exigent circumstances, the Court has not enunciated a particular standard of proof for the existence of the facts which constitute exigent circumstances. The American Law Institute has stated that a search of a premises may be made incident to arrest if probable cause exists to believe that the evidence would be destroyed or removed before a search warrant could be obtained.[221] The Supreme Court implicitly rejected such a stringent standard in both *White* and *Santana*. Any standard enunciated by the Court will vary with the character of the place which has been searched.

During the 1975 term the Court was not explicit in enunciating the factors which constitute exigent circumstances. In the past the Court has relied on a number of factors which in the disjunctive or conjunctive may establish exigent circumstances. These factors include danger to the police if they are required to obtain a warrant,[222] likelihood that the evidence will be destroyed or that the property is actually in the process of being destroyed,[223] evidence

218. Other exceptions the prosecution may justify on the basis of exigent circumstances are airport searches, searches of movable objects, and emergency searches to save life or prevent serious damage to property.

219. 399 U.S. 30, 34 (1970).

220. *See* United States v. Santana, 427 U.S. 38 (1976).

221. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 230.5 (1975).

222. Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971):

> Where once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

223. Johnson v. United States, 333 U.S. 10 (1948). "No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." *Id.* at 15. Vale v. Louisiana, 399 U.S. 30, 40-41 (1970):

> The police also observed Vale's use of the house as a base of operations for his commercial business, his attempt to run hurriedly to the house on seeing the officers, and the apparent destruction of evidence by the man with whom Vale was dealing. Furthermore,

that one of the parties is seeking to escape,[224] ample opportunity to obtain a warrant,[225] presence of known accomplices, and knowledge that the premises are a base of operation for criminal activity.[226] These factors are applicable to a myriad of circumstances: search incident to arrest, immobilization of vehicle, police surveillance, administrative inspections, stop of individuals, and consent searches. The Supreme Court's adoption of a middle-of-the-road position between an historical and a contemporary approach to the amendment, the adoption of a compromise position between expressly overruling the general rule that warrantless searches are per se unreasonable and establishing the warrant clause as paramount, and the lessening of the exigent circumstances standard have resulted in an evisceration of the fourth amendment both in its coverage and in its protection. The primary reason for the Court's reluctance to extend the coverage and protection of the fourth amendment is its remedy, the exclusionary rule, and this Term, the Court failed to extend the exclusionary rule to its logical extreme.

Exclusionary Rule

Neither clause of the fourth amendment provides a remedy when evidence has been obtained from an illegal search or seizure. The remedy formulated by the courts in order to enforce the amendment was first enunciated in *Weeks v. United States*.[227] Commonly

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the police arrival and Vale's arrest were plainly visible to anyone within the house, and the police had every reason to believe that someone in the house was likely to destroy the contraband if the search were postponed.

See G.M. Leasing Corp. v. United States, 20 CRIM. L. RPTR. (BNA) 3035 (U.S. Jan. 12, 1977). Chief Justice Burger, concurring, indicated that this case sets forth "a classic illustration of the dividing line between an impermissible, warrantless entry and one permissible under the 'exigent circumstances' exception to the Fourth Amendment warrant requirement." *Id.* at 3042. While the police had the fugitive's home under a 24-hour surveillance, the agents observed cartons and other materials being removed from the premises by unknown individuals. Against the background of the information and the past history of the fugitive, the observance of this activity "would have justified an *immediate* seizure of the materials being moved in order to protect the interests of the United States." *Id.*

224. Johnson v. United States, 333 U.S. 10, 15 (1948).

225. Trupiano v. United States, 334 U.S. 699, 703 (1948). However, ample opportunity to obtain an arrest warrant, or to obtain a search warrant for a car will not negate exigent circumstances. Lewis v. Cardwell, 417 U.S. 583 (1974); United States v. Watson, 423 U.S. 411 (1976).

226. Vale v. Louisiana, 399 U.S. 30, 40 (1970).

227. 232 U.S. 383 (1914). The history of the exclusionary rule is set forth in an article written by Chief Justice Warren E. Burger: Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 4-10 (1964).

known as the exclusionary rule,[228] this rule provides that evidence obtained in violation of the fourth amendment may not be offered into evidence at a criminal trial against the person whose rights were violated. The Supreme Court found that without such a rule, fourth amendment rights would be of no value to those accused of a crime and "might as well be stricken from the Constitution."[229] The exclusionary rule was held applicable to the states in *Mapp v. Ohio*.[230]

Courts have often stated that judicial integrity requires the exclusion of illegally obtained evidence. This opinion was first advanced by Justices Brandeis and Holmes in their dissenting opinions in *Olmstead v. United States*.[231] Arguing for the exclusion of evidence seized through illegal wiretapping, they stated that the issue of judicial integrity was a moral or ethical question not susceptible of easy solution. In *Olmstead*, Justice Holmes indicated that it was not enough for the Court to disapprove of the way the evidence was obtained. Rather, he believed that it was better for some criminals to go free than for the government to "play an ignoble part" in admitting the evidence at trial.[232] Justice Brandeis argued that illegally obtained evidence had to be excluded in order to "preserve the judicial process from contamination."[233] In an often quoted passage he stated: "If the Government becomes a law breaker, it breeds contempt for law; . . . it invites anarchy."[234]

In 1968, the Supreme Court in *Terry v. Ohio*[235] reemphasized the question of judicial integrity: "Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[236] However, there is

228. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 418 (1971), Mr. Chief Justice Burger, dissenting, refers to the remedy as the "suppression doctrine."
229. Weeks v. United States, 232 U.S. 383, 393 (1914).
230. 367 U.S. 643 (1961).
231. 277 U.S. 438 (1928).
232. *Id.* at 470 (Holmes, J., dissenting).
233. *Id.* at 484 (Brandeis, J., dissenting).
234. *Id.* at 485.
235. 392 U.S. 1 (1968).
236. *Id.* at 13. *See also* Mapp v. Ohio, 367 U.S. 643, 659 (1961), placing emphasis on the "imperative of judicial integrity."

little impact on judicial integrity when the police officer acting in good faith illegally seizes evidence. In *United States v. Peltier*,[237] a majority of the Court held that the fourth amendment exclusionary rule did not require the suppression of evidence obtained by roving border patrols. In *Almeida-Sanchez v. United States*, Mr. Justice Rehnquist wrote for the majority:

> [I]f the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.[238]

The principal justification for the exclusionary rule is the deterrence of illegal police conduct. As formulated by the Court, "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[239] Any doubts regarding the reason for the rule were resolved in *Linkletter v. Walker*,[240] which applied *Mapp* retroactively. The Court noted there that "the purpose [of the *Mapp* decision] was to deter the lawless action of the police."[241] Again in *United States v. Calandra*,[242] the Court stated that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment . . ."[243]

The Supreme Court has refused to extend the exclusionary rule. In *United States v. Janis*,[244] the Court held that the exclusionary rule did not forbid the use of illegally seized evidence in a federal civil proceeding when the evidence was seized in good faith by state

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237. 422 U.S. 531 (1975).
238. 422 U.S. at 537.
239. Mapp v. Ohio, 367 U.S. 643, 656 (1961), *quoting* Elkins v. United States, 364 U.S. 206, 217 (1960).
240. 381 U.S. 618 (1965).
241. *Id.* at 637. *See also* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 413 & 415 (1971) (Burger, C.J., dissenting); Alderman v. United States, 394 U.S. 165 (1969); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U. L. REV. 16, 34 (1953); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P.S. 171, 179 (1962); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1002-03 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).
242. 414 U.S. 338 (1974).
243. *Id.* at 347.
244. 428 U.S. 433 (1976).

law enforcement officials. In *Stone v. Powell*,[245] the Court held that a state prisoner who had an opportunity for a full and thorough litigation of his fourth amendment claim was not entitled to use habeas corpus to again challenge an allegedly illegal search, seizure, or arrest.

In both *Janis* and *Powell* the Court emphasized that the "primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights."[246] Thus, evidence obtained in good faith by state law enforcement officials for use in civil proceedings is admissable because it does not violate judicial integrity. Similarly, judicial integrity is not offended by preventing a collateral attack on a conviction based on a fourth amendment violation. As Justice Blackmun noted in *Janis*:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose. . . . The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment.[247]

Chief Justice Burger has rejected the judicial integrity rationale. The majority of the Court, however, looks at the nature of the misconduct to determine whether judicial integrity would be violated by admitting the evidence. When there is an unintentional violation of an individual's rights, the focus is upon deterrence. The Court has recognized that although a number of studies were done on the deterrence of the exclusionary rule, they have not provided definitive answers. In response to those proponents who claim that substantial deterrence results from the use of the exclusionary rule, the Court indicated that the additional marginal deterrence in light of the costs to society would not justify extending the rule to civil

245. 428 U.S. 465 (1976).
246. *Id.* at 486. *See also* United States v. Janis, 428 U.S. 433, 458 n.35 (1976).
247. 428 U.S. at 458 n.35 (citations omitted).

proceedings. Contrariwise, if the rule does not deter, there is no need to extend the exclusionary rule.

The Court probably will take a utilitarian approach in determining when to apply the exclusionary rule. If a litigant can demonstrate that the benefits achieved by excluding the evidence would outweigh the cost to society, the exclusionary rule should be applied.

The Supreme Court's refusal to extend the exclusionary rule to its logical extremes has manifested itself in other decisions. In 1969 in *Alderman v. United States*,[248] the Court refused to grant standing to a coconspirator to allow the coconspirator to object to evidence illegally obtained. Similarly, in *United States v. Calandra*,[249] the Court held that illegally seized evidence may be used in grand jury proceedings to question a witness; and in *Brown v. United States*,[250] the Court held that a balancing test must be used to determine whether evidence was tainted. One of the key factors in this balancing test was the nature of the misconduct surrounding the obtaining of the original evidence. The Court stated that in this situation the secondary evidence must be excluded under the exclusionary rule.

If the Court does focus on the nature of the misconduct in determining whether to apply the exclusionary rule, evidence obtained in good faith should not be excluded because the benefit derived by excluding the evidence would at best be minimal. However, if an intentional violation occurs, the benefit derived would be more substantial. These results will create uncertainty about protection. Many of the alternatives to the exclusionary rule—for example, substantive tort actions and a federal common law cause of action —would not be an available remedy if the officer was acting in good faith at the time of the fourth amendment violation.

Because these alternatives are usually feasible only when the officer's misconduct is intentional or reckless, both the alternatives and the exclusionary rule would be available when such misconduct occurs. Whenever the misconduct is based on good faith, the rule would not apply. Arguably, this approach would encourage violations of the fourth amendment because of the difficulty in showing an intentional or reckless violation of the fourth amendment.

248. 394 U.S. 165 (1969).
249. 414 U.S. 338 (1974).
250. 411 U.S. 223 (1973).

CONCLUSION

A changing perception of the right to privacy has come about under the Burger Court. This change is probably what motivated Justice Marshall's statement concerning the continuing evisceration of fourth amendment rights. However, this evisceration has not necessarily occurred because of an overruling of Warren Court decisions. Rather, it has been occasioned by an alteration in judicial philosophy and by the failure of the Burger Court to carry Warren Court decisions through to their logical conclusions. Because the Court has failed to articulate guidelines concerning fourth amendment coverage and because it has refused to extend the protection of the fourth amendment, there has been a lessening of the right to privacy in the United States. If the Court were to furnish practical guidelines concerning the coverage and the protection offered by the fourth amendment, society would be benefited by more effective law enforcement and by an enhanced right to privacy for all individuals.

The main reason that the Court has not extended the right to privacy is the lack of an adequate remedy for fourth amendment violations. If the remedy benefited society as a whole rather than only the criminal, the Court might extend the right to privacy both in its coverage and in its protection. However, until the legislative bodies can devise a reasonable alternative to the exclusionary rule, the Court will be hesitant to extend the right to privacy.